IN THE SUPREME COURT OF IOWA

Request for Public Comment Regarding Proposed Amendment to Rule of Appellate Procedure 6.1005 Regarding Frivolous Appeals and Withdrawal of Counsel and Related Rule Changes	)	**Order**

The supreme court requests comments on a proposed amendment to Iowa Rule of Appellate Procedure 6.1005 ("Frivolous appeals; withdrawal of counsel") and related rule changes. This amendment would add two categories of cases to the existing classes of cases where rule 6.1005 procedures cannot be utilized. Clarifying amendments to two other rules would also be made. Together, these changes are intended to result in a fairer and more efficient handling of criminal appeals.

BACKGROUND TO PROPOSED AMENDMENTS

In *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), the United States Supreme Court addressed the constitutional obligations of an appointed appellate counsel who finds the appeal wholly frivolous after a conscientious examination and moves to withdraw. The court concluded that the request to withdraw must be "accompanied by a brief referring to anything in the record that might arguably support the appeal"; the request should be furnished to the client "and time allowed him [or her] to raise any points that he [or she] chooses"; and the appellate court should proceed, "after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* at 744, 87 S. Ct. at 1399.

Iowa Rule of Appellate Procedure 6.1005 sets forth a procedure for court-appointed attorneys in Iowa to follow when they believe an appeal is frivolous. The procedure is intended to mirror the requirements established by the United States Supreme Court in *Anders* and subsequent cases. It requires counsel to file a brief "referring to anything in the record that might arguably support the appeal." Iowa R. App. P. 6.1005(2)(a). It requires written notice to the client and an opportunity for the client to respond. *Id.* 6.1005(3). Additionally, it provides that this court "will, after a full examination of the record, decide whether the appeal is wholly frivolous." *Id.* 6.1005(6). A number of courts have established rules that outline the requirements for *Anders* briefs in greater detail. *See, e.g., Anders* Guidelines, U.S. Court of Appeals for the Fifth Circuit, *available at* www.ca5.uscourts.gov/clerk/AndersGuidelines.pdf.

Rule 6.1005 procedures may not be used in termination of parental rights or child in need of assistance appeals. This was based on a prior determination by this court that the appropriate processing of these appeals would be furthered by requiring the ongoing participation of counsel.

In recent years, the supreme court has seen a large volume of rule 6.1005 motions filed in direct criminal appeals and postconviction relief appeals. Roughly 250 such motions are filed each year. This equates to approximately 30 percent or more of these categories of appeals.

The court believes this rate is substantially in excess of the rate at which *Anders* motions are filed in other jurisdictions. *See generally* Martha C. Warner, Anders *in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others'*, 23 Fla. St. U. L. Rev. 625 (1996). A number of states do not allow *Anders* motions to be filed at all. *Id.*

The current volume of *Anders* motions has placed a considerable burden on the court's personnel. To decide these motions, the court must review the entire record and consider potential appellate arguments, a burden that can be quite substantial when the defendant is appealing from his or her conviction following a trial. This is a burden the court does not have when the defendant's appellate counsel proceeds with the appeal and files a regular merits brief under rule 6.903. In that case the court only needs to consider the arguments raised in the appellant's brief.

Because of reduced staffing levels resulting from budget limitations, the court is simply not equipped to handle the current volume of *Anders* motions. A substantial backlog has developed in the processing of these motions; at present, the court has over one hundred *Anders* motions in inventory. In some instances, criminal defendants have served their sentences before their appellate attorneys' *Anders* motions were ruled upon.

In the court's experience, *Anders* motions often do not save resources and result in the inefficient handling of criminal cases. For example, when the motion of appellate counsel to withdraw is granted, the defendant frequently files a postconviction relief proceeding, for which new counsel is appointed at state expense. In that postconviction relief proceeding, PCR counsel raise arguments that could have been asserted earlier by counsel on direct appeal.

Also, *Anders* motions have been filed in cases where the defendant actually had a meritorious appeal. On several occasions, the court has denied the *Anders* motion, the appointed counsel has continued with the appeal, and the defendant ultimately obtained relief.

After careful consideration of this matter, and discussion with the offices of the State Public Defender and the Attorney General, the court proposes a rule change that would carve out direct criminal appeals *from trials* and

appeals from postconviction relief proceedings *where there was an evidentiary hearing* (unless the court disposed of the application on the basis of the statute of limitations, res judicata, or law of the case). The rule 6.1005 procedure would not be available in those categories of cases, just as it is not available in termination of parental rights or child in need of assistance appeals. The rule 6.1005 procedure would continue to be available in other categories of criminal cases, including direct appeals from guilty pleas. Those other categories comprise a large percentage of the current inventory of *Anders* motions; they would still be eligible for the rule 6.1005 process.

The court's preliminary view is that this change would have the following effects:

1. It would reduce the burden on the court, for the reasons discussed above.

2. It would lead to a quicker resolution of some criminal appeals.

3. It would in some instances require less briefing by appointed counsel. Many *Anders* briefs filed on a direct appeal from a trial are quite lengthy. This length results from counsel's obligation to refer to "anything in the record that might arguably support the appeal." Merits briefs can potentially be shorter, because counsel is only required to address the issues that counsel has decided are worthy of being raised.

4. It would not necessarily increase the workload of the Attorney General's office. *See* Iowa R. App. P. 6.903(3) (allowing appellee to waive filing of brief).

5. It would reduce the number and scope of later postconviction relief proceedings.

6. It would lead to fairer outcomes, by subjecting more appeals to a truly adversarial process.

In *Mosley v. State*, 908 N.E.2d 599, 602 (Ind. 2009), the Indiana Supreme Court recently decided under its supervisory authority that "in any direct criminal appeal as a matter of right, counsel must submit an advocative

brief." In the view of that court, such an approach is "simpler, more effective, fairer, and less taxing on counsel and the courts." *Id.* at 608. It also "may force counsel to be more diligent and locate meritorious issues in a seemingly empty record." *Id.*

In addition to a change to rule 6.1005, the court proposes a change to rule 6.1201 and an additional comment to rule 32:3.1. The change to rule 6.1201 is intended to clarify that a voluntary dismissal of a direct appeal does not have preclusive effect on a subsequent postconviction relief proceeding. The additional comment to rule 32:3.1 is designed to assure counsel that if she or he is not allowed to withdraw from representing a party on appeal based on the frivolousness of the appeal, the pursuit of that appeal will not be deemed a violation of rule 32:3.1.

REQUEST FOR COMMENT AND DEADLINE

The supreme court seeks public comment on the proposed amendments prior to taking further action on them. The text of the proposed amendments follows this notice and the proposed amendments are available at www.iowacourts.gov/Supreme_Court/Orders/. In addition, copies are available at the office of the Clerk of the Supreme Court.

Any interested organization, agency, or person may submit written comments. Comments about a proposed rule must refer to the specific rule number (for example, Rule 6.1005(2)) and the specific numbered line or lines to which the comments are directed. Comments sent by email must be e-mailed to **rules.comments@iowacourts.gov**, must state "**appellate rules**" in the subject line of the e-mail, and must be sent **as an attachment to the e-mail in Microsoft Word format**. Instead of submission by email, comments may be delivered in person or mailed to the Clerk of the Supreme Court, 1111 East

Court Avenue, Des Moines, Iowa, 50319. **The deadline for submitting comments is 4:30 p.m. on March 16, 2012.**

Dated this 16th day of February, 2012.

THE SUPREME COURT OF IOWA

By Mark S. Cady
Mark S. Cady, Chief Justice